SYARIKAT KEMAJUAN KUARI (M) SDN BHD

v.

SU ABDULLAH & ANOR

HIGH COURT MALAYA, KUALA TERENGGANU
NIK HASHIM J
[CIVIL APPEAL NOS: 12-33-2001 & 12-34-2001]
12 JANUARY 2003

TORT: *Damages - Trespass to land - Nominal damages - Award of RM10,000 by trial judge - Inability to quantify losses - Amount awarded under speacil and general damages - Whether excessive - Whether nominal damages be made under general damages only*

The defendant was a quarry operator and in carrying out related activities, had caused earth and stones to fall onto the plaintiffs' lands. As a result, their fruit trees were destroyed. The plaintiffs claimed for special and general damages and the Sessions Court judge, upon finding the defendant liable, proceeded to award nominal damages of RM10,000 to each of the plaintiff to cover both special and general damages as the plaintiffs were unable to quantify their losses. The defendant appealed to this court against the said decision, contending that the award of RM10,000 as nominal damages was excessive, and not in accordance with current judicial trends.

Held:

[1] Though the plaintiffs were unable to strictly prove their special damages, evidence clearly proved that their land and the fruit trees were damaged as a result of the defendant's negligence. However, the Sessions judge had erred by awarding a combined nominal damages for special and general damages to the plaintiffs. As the damages could not be quantified, he should have awarded nominal damages under general damages only. (p 583 e-g)

[2] Whilst trespass to land is a tort actionable per se, in that it allows nominal damages to be awarded in absence of proof of damage, the court must exercise this discretion judiciously. On the present facts, the award of RM10,000 to each plaintiff was excessive and ought to be reduced to RM5,000. (p 583 h)

[Appeal allowed with half costs to appellant.]

Case(s) referred to:
Brandeis Goldschmidt & Co Ltd v. Western Transport Ltd [1981] 1 QB 864 ***(refd)***
Chong Kin Kong v. Hiew San Ngok & Ors [1997] 1 LNS 357 ***(foll)***
Hock Hua Iron Foundry v. Naga Tembaga Sdn Bhd [1999] 1 CLJ 89 ***(refd)***
Janaki & Anor v. Cheok Chuan Seng & Ors [1973] 2 MLJ 96 ***(refd)***
Letrik Bandar Hup Heng Sdn Bhd v. Wong Sai Hong [2002] 5 CLJ 170 ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777 ***(refd)***
Tay Tuan Kiat & Anor v. Pritam Singh Brar [1987] 1 MLJ 276 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 28(1)

Other source(s) referred to:
McGregor on Damages, 16th edn 1997, pp 281, 282, paras 421, 422, 423

For the appellant - Jacob Goldie; M/s Jacob Goldie & Toh
For the respondents - Mohd Badrol Awang; M/s Abdul Haris & Co

Reported by M Maheswaran

JUDGMENT

Nik Hashim J:
There are two appeals before the court and both of them raise identical issues. In the circumstances, the parties have agreed that the decision in respect of Civil Appeal No. 12-33-2001 (Summons No. 52-137-1994) binds the parties in respect of Civil Appeal No. 12-34-2001 (Summons No. 52-138-1994). The court acceded to the agreement.

The plaintiffs in the two cases claimed both special and general damages. In both cases the Sessions Court judge found that the appellant was liable for trespass in that it caused stones and earth to fall onto the plaintiffs' land. After finding that the plaintiffs were unable to quantify their losses, the judge proceeded to award nominal damages of RM10,000 to cover both the special and general damages to each of them. This is what he said in his judgment at p. 022 of record:

> 8. Berkenaan dengan kuantum atau pampasan yang wajar dibayar akibat daripada kecuaian defendan, Mahkamah telah menimbangkan hujah plaintif dan mendapati kerugian yang dialami plaintif-plaintif adalah jelas. Namun, perkiraan yang dibuat tidak disokong oleh apa-apa dokumen, resit atau bukti.

9. Oleh itu, Mahkamah membenarkan award yang nominal, iaitu RM10,000.00 bagi gantirugi khas dan am bagi tuntutan 53-137-1994 dan RM10,000.00 bagi gantirugi khas dan am bagi tuntutan 53-138-1994. Mahkamah juga membenarkan tuntutan faedah dan kos.

Dissatisfied with the award, the appellant appeals to this court under s. 28(1) of the Courts of Judicature Act 1964 (Act 91) on a question of law contending that the amount of RM10,000 is not tantamount to nominal damages but is punitive and substantial, and not in accordance with the current judicial trend of RM10. Thus the learned counsel for the appellant suggested nominal damages of RM10 be awarded instead.

Learned counsel for the respondents on the other hand, argued that the amount of RM10,000 as nominal damages is not excessive but reasonable in the present cases and hence he did not appeal against the award. He added that there is no law limiting the amount of award of nominal damages.

McGregor on Damages, 16th edn 1997 at p. 281 tabulated two circumstances which give rise to an award of nominal damages:

(1) Where there is *injuria sine damno*, and

(2) Where damage is shown but its amount is not sufficiently proved.

In my view, the two situations above are relevant to the facts of the present cases.

According to McGregor at paras. 421, 422 and 423, pp. 281 and 282, the 1st and 2nd situations arise as follows:

(1) Where there is *injuria sine damno*

... The best statement as to the meaning and incidence of nominal damages is given by Lord Halsbury LC in *The Mediana* [1900] AC 113 at 116 where he said:

> 'Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.

Thus nominal damages may be awarded in all cases of breach of contract and in torts actionable *per se*. Furthermore, at least nominal damages should be awarded in such cases, but not all the decisions appear to adhere strictly to this.

It is sometimes said that the law presumes or implies damage in every breach of contract or in every tortious invasion of a legal right, and that this, therefore, would justify an award of nominal damages in such cases without proof of actual loss ... .

(2) Where damage is shown but its amount is not sufficiently proved

Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given ... in the present case, the problem is simply one of proof, one not of absence of loss but of absence of evidence of the amount of loss.

The above 2nd principle is found in the following local cases.

(a) *Hock Hua Iron Foundry v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89.

This is a decision of the Court of Appeal where the defendants cross-appealed against the award of nominal damages amounting to RM10 was dismissed by the Court of Appeal. Nominal damages amounting to RM10 was awarded as the defendant had failed to prove its damages.

In that case it was held at "Held (3) (per Abdul Malek Ahmad JCA (as he then was): When damages is shown but the amount is not proved, the court will usually award nominal damages. The trial judge was correct in concluding that the loss had not been proved sufficiently by the defendant and was right in giving judgment for RM10 as nominal damages for the loss of interest on project investment and loss of income on investment."

(b) *Letrik Bandar Hup Heng Sdn Bhd v. Wong Sai Hong* [2002] 5 CLJ 170.

In this case, the Sessions Court judge had awarded the respondent RM27,217.86 for loss of profit as a result of the breach of contract by the appellant. The appellant appealed. In setting aside the sessions court's award of RM27,217.86 and awarding nominal damages of RM10, I ruled that it was wrong for the judge to make such a substantial award without proof of damages. In that case, the respondent failed to provide factual evidence of how his profit of RM27,217.86 was derived at. Therefore, without such evidence, the award was erroneous and ought not to be awarded by the trial judge.

(c) Similarly, in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777, the Federal Court allowed the appeal and awarded nominal damages of RM10 on the ground that the trial judge's basis of assessment of damages could not be supported in law.

Thus, the above three cases indicate that the amount of RM10 is approved as nominal where breaches of contracts were shown but their amounts of losses were not sufficiently proved in the claims for special damages.

Now, I refer to the cases where awards of nominal damages were awarded in torts.

In *Tay Tuan Kiat & Anor v. Pritam Singh Brar* [1987] 1 MLJ 276, the plaintiffs complained that the defendant had wrongfully built the retaining wall on the plaintiffs' land and thereby trespassed on the plaintiffs' land and wrongfully remained in possession of the portion of the land occupied by the retaining wall and the plaintiffs had thereby been deprived of the use and enjoyment of the said portion of the land. It was held by the Singapore High Court that since there was no evidence that the plaintiffs had suffered any damages or loss as a result of the trespass, nominal damages of S$500 should be awarded to the plaintiffs.

In *Chong Kin Kong @ Chong Kim Kong & 4 Ors v. Hiew San Ngok & Ors* [1997] 1 LNS 357, the plaintiffs claimed both special and (general) damages for negligence and for conspiracy to damage the plaintiffs' interest. Richard Malanjum J (as he then was) in allowing a nominal damages of RM5,000 for damages and disallowed special damages, said:

> Accordingly, it is my finding that the Plaintiffs have failed to establish their claim as to the volume of sand and pebbles excavated from their land by the 3rd Defendant. And it is their burden to do so. (See: *Popular Industries Ltd. v. Eastern Garment Manufacturers Sdn. Bhd.* [1989] 3 MLJ 360). Thus, it would not be possible to compute their actual loss. However, that should not mean that they get nothing. They should be entitled at least to nominal damages. See: *Popular Industries Ltd., supra*). In my judgment the sum of RM5,000.00 should be a sufficient nominal damages for the Plaintiffs due to the negligence on the part of the 3rd Defendant in encroaching and excavating on their land.

His Lordship concluded:

> As for damages, only a nominal damages in the sum of RM5,000.00 is allowed with statutory interest as stated above. Special damages disallowed.

Unlike in the contract cases, the above two cases illustrate that a substantial amount of damages may be awarded as nominal damages in torts.

In *Janaki & Anor v. Cheok Chuan Seng & Ors* [1973] 2 MLJ 96, the plaintiffs claimed that the defendants the owners of land opposite their land and separated therefrom by a road had wrongfully entered and trespassed upon their land,

digging a canal and widening and deepening an existing drain thereon. In consequence, the plaintiffs averred that their land had made unsuitable for cultivation or other use, there being imminent danger of sea water inundating their land. There was evidence to inundation by sea water resulting in dying of trees on the plaintiffs' land. Wan Suleiman J (as he then was) held that the defendants were liable to the plaintiffs for the damage caused by inundation by sea water to the estimated amount of RM2,560.

This case shows that damages may be estimated and estimated damages may be awarded in tort.

Brandon LJ in *Brandeis Goldschmidt & Co. Ltd. v. Western Transport Ltd* [1981] 1 QB 864 at 870 said:

> Damages in tort are awarded by way of monetary compensation for a loss or losses which a plaintiff has actually sustained, and the measure of damages awarded on this basis may vary infinitely according to the individual circumstances of any particular case.
>
> It is for the plaintiffs to prove what losses, if any, they have suffered by reason of a tort ...

Returning to the facts of the present appeals, I with respect, agree with learned counsel for the respondents that to award nominal damages of RM10 to each of the plaintiffs in the circumstances of these appeals is very unfair. Though the plaintiffs were unable to prove strictly their special damages of RM40,500 in respect of Civil Appeal No. 12-33-2001 and RM8,400 in respect of Civil Appeal No. 12-34-2001, I find that the photographs tendered and the evidence of the plaintiffs (SP2, SP4) and SP3 at the trial clearly show that the plaintiffs' land and hundreds of their fruit trees had been destroyed by the earth and stones that fell on the plaintiffs' land due to the negligence on the part of the defendant in carrying out its activities as a quarry operator. The damage was obvious. Unfortunately, the plaintiffs could not quantify their losses. The only mistake the trial judge made was that he awarded a combined nominal damages for special and general damages of RM10,000 for each plaintiff. Since the trial court found that the damages could not be quantified, he should not have allowed nominal damages under the special damages. Instead, he should have awarded nominal damages under the general damages only.

It is pertinent to note that trespass to land is a tort actionable *per se*, so that nominal damages can be given even if there is no proof of damage. Though the granting of nominal damages is up to the discretion of the trial court, it is trite law that the discretion must be exercised judiciously. In the circumstances of the present cases, the award of RM10,000 as nominal damages, in my view, is rather excessive.

Therefore, following *Chong Kin Kong, supra*, I consider the sum of RM5,000 is more reasonable and fair, and should be a sufficient nominal damages for each of the plaintiffs. To that extent the appeals are allowed with half costs to the appellant.